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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 305

CITIES SERVICE COMPANY and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Petitioners,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. Respondent's Confusion in Discussing the Interpretation to be Given the Trading with the Enemy Act.

The discussion by Respondent of the various sections of the Trading with the Enemy Act, of the legislative history of that Act and of cases decided under it, has confusion dyed in its thread.

In the first place, there is a confusion between what *type* of property may be seized and where the property must be to warrant its seizure. (See, e. g., Brief, pp. 2, 10-12, 18.) There is no contention here by Petitioners that negotiable bearer bonds cannot be vested at all; the issue is as to the right to vest when the unseized instruments are physically not "within the United States." Confusion is furthered by mixing the problem of how seizure is to be effected with the problem from whom the property is to be taken. Respondent argues that actual reduction to possession is unnecessary and demand is enough (Brief, p. 12, n. 5) as if this were an answer to the problem relating to who (as between obligor and holder) is the proper subject for the demand in the case where seizure is to be effected by demand alone.

A very persistent confusion in Respondent's Brief is that between Congressional discussions relating to blocking and those relating to vesting. (See particularly pp. 13-17.) The discussions in Congress in 1940 (Brief, pp. 13-17) have nothing whatever to do with vesting—they relate solely to blocking and, as has already been developed in Petitioners' Main Brief (see pp. 24-25), the mechanics of blocking depended on control of actions in this country, and hence the requirements for jurisdiction are utterly different. That Congress may have intended in 1941 that the same classes of property as had been subject to blocking be made subject to vesting (Resp. Brief, p. 17) is not indicative of Congressional belief or intention as to the circumstances under which those classes of property could be regarded as within the jurisdiction.

Frequent shifts in Respondent's Brief between references to bonds and references to stocks enhance the difficulties. (See, e. g., n. 7, pp. 12-13, and pp. 14-16.) Respondent persistently treats these two as if they were the same

and presented similar problems as to jurisdiction. It is misleading to treat a Congressional reference to a certificate, in a context indicating that stock certificates were under discussion, as if the discussion necessarily covered negotiable bearer bonds also. Cases relating to simple debts (Resp. Brief, p. 19) are not properly applicable to debts evidenced by outstanding negotiable instruments, because of the difference in the powers of a transferor of the negotiable instrument outside the jurisdiction to give new rights to his transferee.

There is confusion in Respondent's method of reading together provisions of different dates. Thus, Respondent would rely on the subdivisions of § 7 dating from 1917 (see pp. 9-11) but without the limitations inherent in the Act as it then stood, and also without the limitations of the 1941 amendment of § 5(b). Respondent asserts (Brief, p. 10) that § 7(b) "was aimed at transfers to neutrals." The authority for this statement does not appear. The sentence in the statute from which Respondent quotes begins with a reference to transfers in violation of § 3, which prohibits, among other things, trading with the enemy by "any person in the United States." Respondent in the effort to distinguish *Silesian-American Corp.* v. *Clark*, 332 U. S. 469 (see Brief, p. 35), suggests that the reference to the requirement of "compensation" is to be understood as applying merely to the interval between the time when vesting of the property of a foreign national might take place and the time when, as a result of the outbreak of war, § 9(a) became available for the relief of those not enemies or allies of enemies. This appears to imply that vesting under § 5(b) could have taken place as soon as blocking went into effect, that is in 1940, whereas as a matter of fact, the amendment of § 5(b) to authorize vesting of foreign nationals' property did not occur until 1941, after the

outbreak of war (55 Stat. 839-40). It is true, of course, that under the present terms of § 5(b), *vesting* may be permissible in time of national emergency although there is no war—though § 9(a) read literally would then give a right to reclaim to everyone. But as of the date of the *Silesian-American* case, there had been no such interval during which there could have been vesting while the United States had no "enemies" because not at war. To interpret the *Silesian-American* case as the Respondent attempts, appears to be unjustified either by its reasoning or by the situation to which it had reference.

The net result of the slippings back and forth in time, in nature of the property involved and in type of jurisdiction relied on, is to give many false impressions. Only a most careful reading of Respondent's Brief will avail to dissipate the effect of its confusing juxtapositions.

II. American Revolutionary and Civil War Cases and Foreign Cases Involving Wartime Seizures.

It needs to be emphasized (1) that this is the first case under the Trading with the Enemy Act involving vesting, without manucaption, of negotiable bonds located abroad, and (2) that the situation is basically different from the situation as to simple debts or stock (see Petitioners' Main Brief, pp. 15-16, 28). Respondent attempts, for the lack of Trading with the Enemy Act cases dealing with negotiable bonds, to have recourse to earlier American (Revolutionary and Civil War) cases and a few foreign cases.

The Revolutionary and Civil War cases cited by the Respondent (Brief, p. 21) contribute nothing to the understanding of the Trading with the Enemy Act since they involve radically different statutes. Moreover, in the Civil War, the Union could proceed on the assumption that it continuously had territorial sovereignty over the Con-

federate states as over other states, so that there was not the same situation as here in regard to the problem of attempted control over interests within the limits of foreign territorial sovereignty.

None of the American cases is in point on the issue in this case.

In *Ware* v. *Hylton*, 3 Dall. 199 (1796), the decision of the court was that prior payment by the debtor to a state officer, pursuant to a statute purportedly discharging the debt so paid, did *not* suffice as a defense to the debtor in a subsequent suit on the bond. The bond was a penal bond, and it does not appear that it was negotiable.

Miller v. *United States*, 11 Wall. (78 U. S.) 268 (1870), involved the validity of the seizure of *stocks* by notice to the issuing corporation, as sufficient to support jurisdiction for a condemnation proceeding. The preliminary monition to the marshal, in regard to which the marshal was acting in behalf of the executive branch of the Government, directed him to seize bonds and coupons as well as stocks. The return of the marshal (see p. 275) stated that he had seized the bonds and coupons (and no attack appears to have been made upon this aspect of the return). It further stated that he had seized the stocks by serving notice of seizure upon an officer of the corporation. The remainder of the case so far as concerns the validity of the seizure deals entirely with the question of the validity of this form of seizure of the stocks.* Certainly, this case

* The decree, the validity of which was in question, is mentioned as having decreed cancellation of certificates of stock, without any mention being made of bonds (p. 279); the argument for plaintiff in error on this aspect, as summarized, speaks only of stocks and not of bonds (see pp. 280-283); the argument for the United States on this aspect, as summarized, refers only to stocks (emphasizing the fact that transfers thereof could be made only on the books of the corporation) and to simple debts (see pp. 287-289). The court de-

is no authority for the proposition that the *in rem* jurisdiction of the court to condemn negotiable bonds and coupons could be exercised without the physical seizure of the instruments themselves.

In *Alexandria* v. *Fairfax*, 95 U. S. 774 (1877), the Court held that in the prior confiscation proceeding the Court had been *without* jurisdiction (because of lack of proper notice to the debtor), and the plaintiff was allowed to recover. The case, moreover, as the Court recognized, involved *non-negotiable* bonds (see p. 776), sometimes referred to as "stock", (pp. 776, 777), which were expressly stated on their face to be transferable only at the office of the auditor of the corporation (see p. 775), so that the language of the Court with reference to the applicability of *Miller* v. *United States* is explicable.

Pelham v. *Way*, 15 Wall. (82 U. S.) 196 (1872), must be read in conjunction with the prior decision of *Pelham* v. *Rose*, 9 Wall. (76 U. S.) 103 (1869). *Pelham* v. *Rose* involved a proceeding, by the holder and payee of a negotiable note, against the marshal and his sureties. The complaint was based on the falsity of the return to the writ of monition in an earlier confiscation proceeding involving the note, in that the marshal reported arresting the property whereas he had not seized the instrument, the latter having been outside the state. The Court

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scribes the proceeding as one to confiscate shares of stock (p. 292); describes the condemnation and sale as having been of shares of stock (p. 293); and refers to the error assigned upon this aspect as having been that there was "no such seizure of the stocks as gave the court jurisdiction to condemn them as forfeited" (p. 294). There is some reference to "credits" (see pp. 296-298) but it occurs in connection with the language of the statute (which used the word) and the passage refers only to general principles applicable to intangibles. Bonds are not mentioned at all in connection with the discussion of this assignment of error. The dissents likewise in discussing methods of seizure refer only to stocks not to bonds (see pp. 324-326, 328-330).

held that the demurrer to this complaint should be overruled since the monition was directed toward the note, and the seizure of the instrument itself was therefore necessary. In *Pelham* v. *Way*, the court, however, held that only nominal damage had resulted from the failure of the marshal to seize the note, on the theory that the record of condemnation was *not* a bar to the recovery by plaintiff of the *debt*, since there had been no attempt to seize the debt but only the note. Although the decision may be unrealistic in the separation of the debt and the instrument, the case is *not* a holding that a debt embodied in an outstanding negotiable note is a *res* which will support jurisdiction of the Court where only the debtor and not the instrument or the holder is within the Court's jurisdiction.

In *Brown* v. *Kennedy*, 15 Wall. (82 U. S.) 591 (1872) the court dismissed a bill to foreclose a mortgage on local property, upon the defense being made of prior confiscation of the mortgage, bond and debt. It appears that the plaintiff had acquiesced in the prior decree of condemnation, obtaining an order that the money collected should be paid over to him (see p. 599). The court however preferred not to base its decision on that ground. The true basis (so far as the above circumstances were not given weight) appears in the following:

> "Seizure is essential to confer jurisdiction. But the marshal's return that he had attached the bond, mortgage, and credit, conclusively establish that a seizure was made, and that the subjects of the seizure were within the jurisdiction of the court. In this collateral proceeding the complainant is not at liberty to traverse the marshal's return." (p. 597)

The foreign cases cited do not bear either on the interpretation of our statute or on the constitutional problems

here. Moreover, *Sutherland* v. *Administrator of German Property* [1934], 1 K. B. 423 (C. A.), did not involve a bond at all. The right there attempted to be reached by rival custodians was a right of action against shipowners for damages for the loss of the goods as a result of negligence or breach of contract. (The ship on which the goods were carried had gone down in 1912.) The question presented, therefore, was not a question as to the situs of a claim to goods represented by negotiable bills of lading, but of a contract or tort claim based on negligence—in which the bills of lading would of course be part of the evidence tending to establish the claim but nothing more.

The South African case, *Randfontein Gold Mining Co.* v. *Custodian of Enemy Property* [1923] 1 S. A. L. R., App. Div. 576, may appear at first glance to be a precedent for the Respondent's position. Closer examination of the case, however, shows that the decision was based (1) upon concepts of Dutch Roman law in South Africa under which debentures did not have the legal characteristics which have been uniformly attributed to them in the United States, and (2) upon provisions of the Versailles Treaty which the South African court applied. We view this decision as an extreme and unique case in the assertion of might over a debtor within the physical power of the court.

III. The Government's New Vesting Program in Relation to this Case.

In discussing the importance of the present decision, Respondent argues at some length the necessity of preventing successful liquidation of securities looted by the Germans (see Brief, pp. 25-27, 62-68).* Discussion of possible

* Nothing in the Respondent's argument shows that the continuance of the Government's blocking program would not accomplish the desired result. Whether or not the picture of looting and its con-

consequences of a decision here should not, however, distract the Court's attention from the facts of this case. There is nothing whatever in the record to suggest that the bonds here were looted by the Germans. On the contrary, what seems to have happened was a seizure by the Russians, as occupying authorities, of the instruments then in their territory (see R. 33), though Respondent's statement (Br. 3-5) omits reference to this information. The thing which is shocking about the facts here is the extent to which the APC in vesting the bonds as the property of a German has proceeded in the face of facts reported to the APC showing that no such ownership existed. The power has been given to the APC, upon making a determination of enemy ownership, to compel the turnover of property regardless of the correctness of the determination. The consequences have steadily increased in seriousness, because of greater power in the APC to deal with the property once seized, and the limited period for corrective action under §§ 9 or 32. It has always been assumed, however, that the APC's determination would be made in good faith. In this connection it must be emphasized that this seizure in 1945 by the Russians, allies of this country in World War II, would appear to be illegal under our law, or unenforceable because of our public policy, only by criteria which would also condemn our own confiscation of private enemy property.

That the Russians disposed of at least two of the bonds here in question is necessarily to be inferred from the cir-

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sequences painted by the Respondent, especially in respect of securities in the Netherlands, is accurate (cf. article by Dr. J. G. Koopmans in Economisch-Statistische Berichten, Rotterdam, January 25, 1950, No. 1707; V Rechtsherstel—Maandelijks Orgaan van de Raad voor het Rechtsherstel, No. 2 (August, 1950, The Hague), pp. 436-440), the matter is irrelevant.

cumstances under which they appeared in this country (see R: 32-33). Moreover, the fact that one of the bonds (M23318) was called in 1947 and matured in 1950, by no means makes it impossible for there to be a holder in due course of the instrument (*cf.* Resp. Brief, pp. 38-9, also 30), since obviously it could have been acquired by a neutral not only prior to 1950 but prior to 1947. The purported vesting occurred in 1949 (R. 8-10). The other bond (M7029) bore a maturity date of 1969 (Complaint, R. 4-5, not denied). The calling of a bond before its maturity date does not destroy its negotiability. *Morgan* v. *United States*, 113 U. S. 476 (1885).

IV. The Constitutional Problems.

A. The Standing of Petitioners to Raise the Question of Unconstitutionality Because of Seizure of Non-Enemy Bondholders' Rights Without Due Process.

Respondent persists in asserting (Brief, p. 28) that the Petitioners have no standing to assert the interests of bondholders. Even apart from any fiduciary duty of the Chase National Bank, as trustee under the indentures, to protect the rights of its cestuis, Petitioners' right vicariously to present the bondholders' position for the benefit of the bondholders alone, is to be distinguished from Petitioners' right to raise the question of constitutionality in this aspect because of the effect of unconstitutionality on their own rights. If, after the statute of limitations for claims against the Government had run, non-enemy holders in due course of these bonds were to sue Petitioners on the bonds, the defense to that action would necessarily have to be the provisions of the Trading with the Enemy Act, particu-

larly the exculpatory clauses. If, however, a court of this country having jurisdiction over that claim were to find that the Trading with the Enemy Act, as it would be applied to those holders by sustaining the defense, would unconstitutionally deprive them of their property, the attempted defense would be unsuccessful. Hence on their own behalf, Petitioners necessarily must have standing now to raise the issue of constitutionality as to the bondholders, since a decision of that issue is necessary to their protection and affects their rights. (*Cf. Anderson National Bank* v. *Luckett*, 321 U. S. 233, 243 (1944), *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 474, 479-480 (1947).)

B. Constitutional Difficulties Resulting from the Taking of Petitioners' Own Property.

The fallacy that lies behind Respondent's whole treatment of this aspect of the constitutional problem lies in the treatment of the question as one merely of consequential and speculative *damage* to Petitioners, rather than as a direct taking of Petitioners' property. When an obligation on a negotiable instrument is vested, the payment which the debtor makes is a payment from his own funds and it is made directly to the Government for public purposes. It is only by a fiction that the seizure may be regarded as being that of the obligee's property rather than the obligor's; and the fiction is justified only if the legal consequence of the payment is the effectual discharge of the obligor's liability. Unless there is a complete discharge, what the Government gets, both literally and in legal effect, is the debtor's money. This aspect is indeed emphasized by the Respondent's insistence, for purposes of situs, of the presence here of the obligor and his prop-

erty. But if the location is here for purposes of jurisdiction, the Respondent should not escape the corollary of the constitutional protections to which the American obligor and his property are entitled.

The fact that it is theoretically possible that under some circumstances the obligor's continuing liability to the true obligee may not in the event be enforced, is beside the point; and the phrasing of the problem in terms merely of "double liability" gives rise to false implications. The turnover would be now, and unless the discharge is presently effected, the constitutional question arises now. There can therefore be no comfortable postponement of Petitioners' deprivation as a problem that may never occur, because the deprivation is the result of the enforcement of the statute, and that enforcement should not be directed unless the constitutional protections exist, since otherwise the obligor may be left remediless.* The destruction of the obligee's claim against the obligor is the prerequisite to a taking, since no provision for indemnity is made by the statute. The Respondent appears to regard this requirement as presenting an insuperable obstacle to the vesting program; but the statute might have provided for indemnity; and if indeed the probability that the obligor will be held liable abroad is as slight as Respondent

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* Cases like Pflueger v. United States, 121 F. 2d 732 (C. A. D. C. 1941), *cert. denied*, 314 U. S. 617 and Duisberg v. United States, 89 F. Supp. 1019 (Ct. Cl. 1950), *cert. denied*, 340 U. S. 890 (*see* Resp. Br., p. 34) which appear to regard the restrictions of § 7(c) of the Act, (providing that the remedies under the Act are exclusive) as effective to withdraw jurisdiction over a suit against the sovereign even on the basis of a claim under the Constitution, furnish, if correctly decided, but the greater reason why the deprivation should not be affirmatively enforced by this Court in the absence of a provision for compensation.

now contends (Resp. Brief, pp. 38-40), the burden of indemnity, far from being impossible or impracticable (*cf.* Resp. Brief, p. 50), would be trifling. In the absence of a provision for indemnity, however, the test can only be whether a discharge is effected by the taking, and the non-enforcement of liability in some instances is of course entirely meaningless as long as other countries, without departing from accepted legal principles, may enforce the obligation. Respondent has, for example, done nothing to negative the clear probability of liability in Switzerland (see Petitioners' Main Brief, pp. 36-38).

Obviously there is a difference in the constitutional aspect between the situation of a debtor, particularly that of the obligor on a negotiable instrument, and the situation of one who holds an enemy's identifiable property as bailee, agent or trustee. What a bailee, agent or trustee in those circumstances would turn over to the Government would not be his own property but the identifiable property of the enemy, and any possible future liability on his part would be only on a basis of *damages* for conduct compelled by the Government, since the performance for which he contracted, namely, the turnover of the *res*, would have become a practical impossibility. But what an obligor transfers to the Government is his own property; and in order to hold him liable to the obligee on the bond, a foreign court need do no more than enforce the precise obligation he originally incurred on the bond (a performance which has not become factually impossible), disregarding the purported termination of the obligation. In view of widely accepted principles (see Petitioners' Main Brief, pp. 15-21) as to the location of the property in a negotiable bond, and the power of a holder to transfer it free of defenses available as against him, it would not

be difficult for a civilized court to reach such a result in the case of a negotiable bond, even apart from such strong views on public policy as actuated the Swiss courts in the decisions already mentioned (see Petitioners' Main Brief, p. 37). The Respondent asserts that the APC succeeds to rights of the holder (Brief, p. 37), but this is hardly the case where there is nothing but a demand on the obligor. The case which Respondent cited to support his assertion (*Commercial Trust Company* v. *Miller*, 262 U. S. 51) is a case where the negotiable bonds were held by the trustee and could physically be transferred to the APC.

The Respondent cites (pp. 41-42) a number of cases to establish the proposition that the United States will not be liable to pay compensation to Petitioners.* These cases emphasize the difficulty of recovery on the theory of an implied contract to pay the compensation required by the Constitution (which the opinion below regarded as the available remedy); but they do nothing to establish the absence of a constitutional right to provision for compensation before a court will affirmatively enforce the taking. The cases cited were cases involving incidental damage or destruction as a consequence of Governmental action, such as an occasional flooding resulting from river improvement or a flooding not anticipated as a result of an irrigation plan (the *Sanguinetti* and *Horstmann Co.* cases); the loss of profits where contracts had been frustrated by Govern-

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*Morrisdale Coal Co. v. United States, 259 U. S. 188 (1922)
Sanguinetti v. United States, 264 U. S. 146 (1924)
Horstmann Co. v. United States, 257 U. S. 138 (1921)
Omnia Co. v. United States, 261 U. S. 502 (1923)
Mitchell v. United States, 267 U. S. 341 (1925)
Bedford v. United States, 192 U. S. 217 (1904)
Mullen Benevolent Corp. v. United States, 290 U. S. 89 (1933)
Danforth v. United States, 308 U. S. 271 (1939)

mental seizure of the subject matter of the contract (the *Omnia Co.* case), or by price control regulations (the *Morrisdale Coal Co.* case); the destruction of a business as an incident of the taking of land which was paid for (the *Mitchell* case); incidental loss of a possible source of satisfying an obligation as a consequence of Governmental seizure of land thereby made unavailable for assessment (the *Mullen Benevolent Corp.* case); or erosion resulting from natural causes which conjecturally might have been less had the Government not interrupted the process by building revetments elsewhere (the *Bedford* case). None involved enforcement of a direct conveyance to the Government for public uses, where no compensation was provided.

Obviously the present case is not one where a citizen who gives himself or his business a foreign residence must be held to have assumed the risk that when and if that country becomes an enemy, he himself may likewise fall within the enemy classification. Such cases as *Green* v. *U. S.*, 10 Ct. Cl. 466 (1874), are therefore inapplicable.

With cynical inversion of the principle, Respondent recites the rules as to diplomatic protection of citizens abroad as if those rules were an answer to the problem here. The doctrine alluded to (Brief, pp. 45-6) is the one that our courts may not give a remedy for cases of seizure or other wrong by a foreign government within its own territory (*see, e. g., Shapleigh* v. *Mier*, 299 U. S. 468, 471 (1937) and *Underhill* v. *Hernandez*, 168 U. S. 250 (1897), the remedy for such a foreign failure to meet international standards of acceptable conduct being a matter for Governmental action, to be pursued by diplomacy or war (*see* Borchard, Diplomatic Protection of Citizens Abroad (1915) §§ 14, 7, 15, Moore, Digest of International Law (1906) VI, pp. 249, 696-7). Here the prospect is not of a failure of the foreign

government to meet civilized standards—the prospect is merely that the courts there may continue to enforce an obligation according to its original terms, refusing to recognize a "discharge" resulting from a purported United States seizure. The "risk" here arises not from arbitrary foreign action—which is a risk the American abroad may have to take. The risk arises as a consequence of *home* seizure, which may be denied extraterritorial effect in the foreign country. To absolve the United States from its constitutional duty to compensate for property surrendered to it under compulsion, for public use, on a theory that "protection" against foreign governments' wrongs is a matter for diplomacy, the exercise of which is discretionary, is to give the same sinister overtones to the word "protection" it has acquired in other unhappy connections.

In the last analysis, the Respondent's argument of the right to take rests on an argument that there exists the power, because the obligors can here be compelled. Petitioners do not contest that brute power exists. But this country has customarily taken pride that its laws had a firmer basis than brute power alone, and has rejected the view, which we usually ascribe to totalitarian rulers, that whatever a government can compel it has a right to compel. Something more than bare power is necessary to justify the present action. The benefit of what is done under the Act is presumably a benefit to the United States as a whole. The theory of our constitutional provision has been that where there is a seizure for our united benefit, the loss from the seizure should not be borne by single citizens alone, but should be equitably distributed. The necessities of modern warfare may call for drastic economic action. It does not follow that ensuing losses to

blameless citizens should not be compensated, that all who benefit may help to bear the burden.

Respectfully submitted,

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